O/A 4-12-85

FILED
SID J. WHITE
APR 3 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ETC.,	**	
Petitioner,	**	CASE NO. 65,656
vs.	**	
SHERAN PORR, ETC.,	**	DISTRICT COURT OF APPEAL FIRST DISTRICT, NO. AO-289
Respondent.	**	
SHERAN PORR, ETC.,	**	
Petitioner,	**	CASE NO. 65,674
vs.	**	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ETC.,	**	DISTRICT COURT OF APPEAL FIRST DISTRICT, NO. AO-289
Respondent.	**	

REPLY BRIEF OF CROSS-PETITIONER SHERAN PORR

THOMAS W. DAVIS
BARTON, DAVIS, FERNANDES & JAMIESON
200 NORTHEAST FIRST STREET
GAINESVILLE, FLORIDA 32601
Attorney for Respondent
SHERAN PORR

An appeal from the First District Court of Appeal
Case No. AO-289

TOPICAL INDEX

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The Petitioner, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, is referred to in this Brief as "STATE FARM", Insurance Carrier or Petitioner.

The Respondent, SHERAN PORR, individually, and as Personal Representative of the Estate of Robert Ray Ward, will be referred to as "PORR". Sheran Porr's minor child killed in the crash, Robert Ray Ward, will be referred to as "ROBERT" or the minor child.

References to the Appendix are designated as (App.-).

Uninsured Motorist Coverage is referred to in this Brief as UM Coverage.

SUMMARY OF THE CASE AND ARGUMENT

Robert Ward was the minor son of Sheran Porr and lived with her. Sheran Porr owned three vehicles and insured each of them under separate insurance policies sold to her by State Farm. On August 9, 1981, an unrelated person, Glen Spradlin, drove one of Porr's vehicles and, due to his negligence, crashed the vehicle, killing both him and the minor child, Robert Ward, a passenger. Glen Spradlin was totally unrelated by blood or marriage to either Porr or Robert Ward. Glen Spradlin had purchased no motor vehicle liability insurance himself which would provide relief to innocent persons injured through his negligence.

It is Sheran Porr's contention that the Florida Uninsured Motorist Statute was enacted so that every innocent insured could recover for the damages he would have been able to recover if the negligent offending motorist had maintained a policy of liability insurance to provide protection. Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229, 234 (Fla. 1971). The only exception expressly statutorily recognized is when the insured specifically rejects the coverage. Mullis at 238. As the statute was written and passed by the legislature to protect insureds and not insurance companies, the general rule is that insurers may not limit the applicability of uninsured motorist protection and insurers may not draft into the adhesion contracts clauses that "whittle away" at statutorily mandated uninsured motorists' benefits. See, e.g., Brown v. Progressive Mutual Insurance Company, 249 So. 2d 429 (Fla. 1971); Mullis, Supra; Salas v. Liberty Mutual Fire Insurance Company, 272 So. 2d 1

(Fla. 1972); Reid v. State Farm Fire and Casualty Company, 352 So. 2d 1172 (Fla. 1977); Curtin v. State Farm Mutual Automobile Insurance Company, 449 So. 2d 293 (Fla. 5th D.C.A. 1984).

In the instant case, the three separate UM policies sold by State Farm provided that an uninsured motor vehicle included a land motor vehicle as to which "the insuring company denies coverage." (See Appendix-1)

The First District Court of Appeal is eminently correct in finding that Porr could recover for the death of her minor child by the two UM coverages on the two vehicles not involved in the fatal crash. The First District was eminently correct because, first, this would be in accord with the insurance carrier's own contractual provisions indicating that an UM vehicle was one in which the insuring company denied coverage. That in fact that occurred in the instant case is obvious in that the vehicle would otherwise have had liability coverage through the owner's policy but for the family-household exclusion in the liability section. For the insurance carrier to suggest otherwise, that they had provided no coverage ever at all, is absolutely ridiculous and can be simply tested by asking the insurance carrier if then it would remove the family-household exclusion and go to court trying to indicate that its insuring agreements would not have provided coverage. Such assertions are grasping at the absurd in a way no man-on-the-street could understand. The insurance carrier did in plain truth deny coverage because of the family-household exclusion and therefore under its own definition had an uninsured vehicle. State Farm should then pay uninsured

motorist benefits on the policies of the two vehicles not involved in the fatal crash. Secondly, the First District was eminently correct in finding that Porr could collect UM benefits for the death of her minor child on the two vehicles not involved in the fatal crash because any effort by the insurance carrier to exclude UM coverage in such circumstances would be contrary to the fundamental policy of statutorily enacted UM coverage which is to allow recovery for damages as if the offending motorist had maintained a policy of liability insurance. In this case, it is undeniable that the negligent motorist Spradlin had no liability insurance available to respond to the damages he caused through his negligence. To allow the insurance carrier to exclude UM coverage in such circumstances by excluding particular vehicles from all UM coverage would be contrary to the basic public policy underlying Florida's Uninsured Motorist statute and would be contrary to such case authorities as Salas v. Libery Mutual Fire Insurance Company, 272 So. 2d 1 (Fla. 1972); Mullis, Supra; Lee v. State Farm Mutual Automobile Insurance Company, 339 So. 2d 670 (Fla. 2d D.C.A. 1976); Curtin, Supra, Johnson v. State Farm Fire and Casualty Company, 451 So. 2d 898 (Fla. 1st D.C.A. 1984), among others. Undoubtedly, the persons ruling in those cited cases would be most surprised to hear the instant insurance company's comment that public policy in Florida does not provide UM coverage that goes to vehicles other than the car on which the UM coverage is written. Specifically, Porr would maintain that UM coverage is a form of personal coverage insuring people and going with people no matter what vehicle they are in, rather than

as the insurance carrier apparently maintains that UM coverage is a form of one auto insurance. Further and most noteably, the instant Porr case is indeed far stronger than all of the above cited cases for requiring that the public policy encompassed in Florida's uninsured motorist statute not be voided because, in the instant case, the negligent offending motorist was not related by either blood or marriage to either the minor child killed in the crash or the minor child's mother. Additionally, the mother in the instant case had done all that she possibly could to protect herself and her family by purchasing three different uninsured motorist policies through premiums paid to State Farm. If coverage existed in Salas, Mullis, Lee, supra, etc. and if, as the carrier says, it would exist if Porr had just purchased two policies from two different companies, then obviously coverage should exist here.

The Florida First District Court of Appeal failed to permit recovery by the mother, Sheran Porr, for the death of her minor child as to that one UM provision on the vehicle involved in the fatal crash itself. This was based on the First District's erroneous perception Reid, Supra. In Reid, the Supreme Court noted that insurers, as a general rule, may not limit the applicability of uninsured motorist protection. However, under the specific narrow facts of Reid the Supreme Court allowed an insurance carrier to limit UM coverage, if to do otherwise, "would completely nullify the family-household exclusion" in the liability section of the insurance policy because the insurance policy sued upon in Reid was that one

insurance policy covering the car involved in the crash and in which the negligent driver was a family household member. In Reid, the Supreme Court found that there were enough countervailing strong public policy arguments to allow the insurance carrier to limit the applicability of UM protection in that one set of family-household owner and driver circumstances. The First District Court erred, however, in failing to recognize that the "exception" granted to an insurance carrier in that one set of circumstances in Reid does not then totally void the general rule that insurers may not limit the applicability of uninsured motorist protection. Specifically, Reid recognizes the cases of Mullis, Salas, Supra; etc. Thus it should be that where the underlying public policy reasoning relating to the "family household exclusion" as to both the owner and driver is not involved, the Reid "exception" to the general rule that insurers may not whittle away uninsured motorist protection is not applicable. Under the facts of the instant Porr case, the family-household exclusion rationale is not at all involved because the negligent driver was completely unrelated by either blood or marriage to the insured minor child killed by that driver's negligence. If the primary focus of uninsured motorist benefits remains to allow recovery as if the offending negligent driver had maintained a policy of liability insurance and as there is no countervailing family household exclusion problem relating to the driver (as in Reid), the Reid exception to the general rule does not apply in the instant case and the insurance carrier's attempt in the instant case to whittle away statutorily

delineated UM benefits is void. The Reid case should not be extended to cover the different fact circumstances involved here.

The Honorable Supreme Court should find by long well-established case precedent that the public policy of Florida Uninsured Motorist Statute yet remains to allow recovery whenever the offending negligent motorist has no insurance coverage to respond to the damages he has caused.

ARGUMENT

CROSS APPEAL

POINT I

THE HONORABLE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT RESPONDENT PORR COULD NOT RECOVER FOR THE DEATH OF HER MINOR CHILD UNDER FACT CIRCUMSTANCES WHEREIN THE DEATH OF HER MINOR CHILD, ROBERT WARD, WAS CLEARLY ATTRIBUTABLE TO THE NEGLIGENCE OF AN UNINSURED DRIVER WHO WAS NOT RELATED BY BLOOD OR MARRIAGE TO EITHER THE OWNER OF THE VEHICLE OR THE MINOR CHILD KILLED AND UNDER FACT CIRCUMSTANCES WHERE THERE IS NO LOGICAL RATIONALE SUPPORTIVE OF A HOUSEHOLD - EXCLUSION CLAUSE AS TO UNINSURED MOTORIST BENEFITS, AND THUS UNDER A TOTAL FACT SITUATION WHICH DOES NOT SUPPORT AN EXCEPTION TO THE GENERAL RULE THAT "AN INSURER MAY NOT LIMIT THE APPLICABILITY OF UNINSURED MOTORIST PROTECTION".

It is useful to note at the outset after reading the insurance company's briefs that the dispute between the insurance carrier and Porr in this case appears realistically to boil down to which perspective of the Florida Uninsured Motorist Statute is accurate. Porr has approached this problem with the belief that the policy of Florida's Uninsured Motorist Statute is to allow "every insured...to recover from the damages he or she would have been able to recover if the offending motorist had

maintained a policy of liability insurance." Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). Insurance company attempts to whittle this statutory coverage down are therefore generally void. The insurance carrier's perspective, on the other hand, is obviously that they can write their policies so as to diminish, exclude and minimize the statutorily required uninsured motorist coverage.

In the instant case, the insurance carrier simply wants the total right to define when and under what circumstances a vehicle is or is not an uninsured motorist vehicle so that the insurance company can then control the scope and coverage provided under Florids's statutory Uninsured Motorist Act. Of course, this approach by the insurance carrier is not a new or novel one but is merely another slice in the never-ending attempt by insurance carriers to "whittle away" statutorily required UM coverage.

The short answer to the insurance carrier should be very simple. The purpose of the Florida Uninsured Motorist Act is to afford recovery for damages to the insured that he would have been able to recover "if the offending motorist had maintained a policy of liability insurance" Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229, 234 (Fla. 1971). After the insurance carriers initially lost their effort to cut down this UM coverage by limiting who could sue under the UM coverage and by suggesting that insurance carriers could write policies so as to sell less than required by statute, See e.g., Davis v. United States Fidelity and Guaranty Company, 172 So.2d 45 (Fla. 1st D.C.A. 1965); Standard Action Insurance Company v.

Gavin, 184 So.2d 229 (Fla. 1st D.C.A. 1966), the insurance carriers then attempted to turn their attention instead to providing restrictions which would "whittle away" at UM coverage by severely limiting the definition of a UM vehicle or the circumstances in which UM vehicle incidents would have been held to occur, etc. For example, one of the earliest insurance company attempts to whittle away at UM coverage was by "defining" UM vehicles to state that a UM vehicle could only be a hit-and-run motor vehicle if "physical contact" occurred or the hit-and-run vehicle "strikes" the insured or the insured's vehicle. This was attempted in Butts v. State Farm Automobile Insurance Company, 207 So.2d 73 (Fla. 3 D.C.A. 1968) and in Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971). The insurance company's argument in these cases that they had excluded such hit-and-run vehicles from their definition of uninsured motorist vehicles is obviously logically analogous to the insurance company's position in the instant case that they have by definition excluded other types of vehicles. In both cases, the insurance company simply wants the ability, through its draftsmen, to control the circumstances under which an uninsured motorist may be "defined" to have been involved or under which an "uninsured motorist accident" might be defined to have occurred, etc. The arguments made in the instant case could similarly have been made by the insurance attorney in Brown, wherein the court notes:

"The purpose of the uninsured motorist statute is to

> protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The statute is designed for protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others...
>
> In deciding whether a person is entitled to the protection of Fla. Stat. §627.0851, F.S.A., the question to be answered is whether the offending motorist has insurance available for the protection of the injured party, for whose benefit the statute was written; ... any other construction of the statute is unfair and unduly restricts the application intended by the legislature." (emphasis supplied)

So too in the instant case, the question to be answered is whether the offending motorist Spradlin had insurance available from any source to, in the smallest sense, respond to the damages of the minor killed by Glen Spradlin's negligence. The answer is no and therefore uninsured motorist benefits attach. Interestingly, the same invalid "strikes" provision still exists in the instant State Farm's insurance policy definition of a UM vehicle. Quite obviously, the insurance carrier should not be given the smallest benefit of doubt that whatever its policy says is true or accurate under the UM laws of the State of Florida. The emphasis should obviously be on legislative UM coverage, not what insurance companys would willingly give.

Further efforts at "defining" away the protection of the Florida Uninsured Motorist Act were also tried, for example, in American Fire and Casualty Company v. Boyd, 357 So.2d 768 (Fla. 1st D.C.A. 1978). There the negligent motorist causing injury had liability insurance on his vehicle provided through a liability insurance policy with Geico. Unfortunately, however, that policy

contained clause excluding coverage while traveling on orders from the military service which prevented recovery in that case. Responding to the insurance company's contention that the negligent driver was not in an "uninsured vehicle" because he had insurance coverage that would pay under some circumstances, the First District Court properly noted that the policy afforded no coverage because of its exclusionary clause and therefore the negligent driver was operating an "uninsured vehicle" within the meaning of F. S. §627.727. Again, the focus of the First District Court is on determining whether insurance benefits are available from the offending motorist to respond to the damages suffered by the injured party. This is consistent with Mullis, Brown, and with the entire chain of cases discussing the rationale of the Florida legislature behind the Florida Uninsured Motorist Act. Again, the insurance company's effort to define away an "uninsured vehicle" in the face of the reality that no insurance benefits were available to the injured party was properly rejected.

Similarly, in Johns v. Liberty Mutual Fire Insurance Company, 337 So.2d 830 (Fla. 2 D.C.A. 1976), the insurance company specifically tried to exclude vehicles owned by a municipality from the "definition" of the term "uninsured" vehicles in its policy. State Farm, in the instant case, is well familiar with this because they also still have within their policy a similar invalid exclusion. The improper definitional exclusion was sat aside and recovery was permitted in Johns.

It perhaps might also be useful to digress at this point to simply note that Johns demonstrates also the fallacy of the

insurance carrier's effort to equate UM coverage as being the exact reciprocal of benefits provided under the financial responsibility law. Such is not the holding in Mullis and is certainly not the law. While the Financial Responsibility Act did set the limits of coverage required at the time of Mullis, the Financial Responsibility Act did not specifically define the scope of coverage required under the Florida Uninsured Motorist Act.

Reiterating, it should be clear that the insurance carrier should not be allowed to whittle away uninsured motorist coverage by definitions excluding the reality of whether damages have been received by an injured party from an owner or negligent driver. Allowing the insurance carriers to set the parameters of when and under what circumstances they will pay UM benefits would obviously totally defeat the wide scope of coverage the legislature intended for uninsured motorist benefits. Besides those circumstances in Boyd where the insurance carrier of the negligent driver invoked an exclusionary clause for traveling on military orders, other exclusionary clauses could also be obviously invoked in numerous other circumstances. If such a vehicle negligently injures an innocent person, that person to be denied his own uninsured motorist coverage because of an exclusion clause in the negligent driver's policy. The reality of these cases is that the injured party should be able to recover under Florida's Uninsured Motorist Statute as if the offending motorist had maintained a proper policy of liability insurance, as the Courts have consistently held for over 20 years.

In Mullis, supra, the insurance carrier providing insurance

coverage on the father's two automobiles was required to provide UM coverage for the son's injuries received by the son while riding an uninsured Honda. This was despite an express exclusion clause in the Mullis policy. It is impossible to understand and explain in justice how the courts could justify the extension of uninsured motorist coverage in Mullis yet deny it to Porr in the instant case where Porr had done all she could to protect herself and her family by purchasing uninsured motorist coverage on all vehicles she owned.

The case of Salas v. Liberty Mutual Fire Insurance Company, 272 So. 2d 1 (Fla. 1972) received little discussion by the insurance carrier herein for obvious reasons. In Salas, the minor daughter of the named insured, Raymond M. Salas, was injured in an automobile accident while riding as a passenger in an uninsured vehicle owned and operated by her brother, who was also a resident of the father's household. The other vehicle involved in the accident was fully insured. An insurance policy had been issued by Liberty Mutual Fire Insurance to the father providing uninsured motorist coverage. In Salas, the minor daughter Sylvia made a claim against Liberty Mutual alleging the gross negligence of her brother, Raymond Salas. In defending, Liberty Mutual pled that its policy excluded under uninsured motorist provision any bodily injury to an insured while occupying a vehicle owned by a named insured or resident relative. In short, Liberty Mutual claimed that it had a family household exclusion clause directly in the uninsured motorist coverage provision itself. The Trial Court and District Court of Appeal upheld the

family household exclusion. On appeal to the Supreme Court, the Supreme Court reversed stating that the "family household exclusion patently attempted to narrow or limit the uninsured motorist coverage, contrary to the purpose and intent of Fla. Stat. §627.8051."

The Supreme Court further discussed what would have occurred had Raymond Salas Jr.'s vehicle been insured, but however, if the insurance carrier had thereafter again denied coverage because of a family household exclusion clause argument. The Supreme Court promptly noted that if such a multi-car family situation had arisen, UM coverage protection would still apply. As was further stated by the Supreme Court:

> "Thus, the intention of the Legislature, as mirrored by the decisions of this Court, is plain to provide for the broad protection of the citizens of this State against uninsured motorists. As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate the protection.
>
> A direct attempt of the insurer to limit the applicability of uninsured motorist protection, such as is contained in the policy under consideration here, has already been rejected as struck down by us in Mullis. Why, therefore, should we create such an exception, obviously not in the contemplation of either party, indirectly. We feel that we should not."

Obviously, the Florida Supreme Court in Salas directly struck down a direct application of any family household exclusion clause directly into uninsured motorist coverage. Again, the critical question to be asked was not wherever or whenever the innocent person was injured, but whether the injured

person would have available to him damages from the offending motorist as if the offending motorist had maintained a policy of liability insurance. Thus it was that an effort to directly inject a family household exclusion into uninsured motorist coverage was set aside. How it is that the instant insurance carrier State Farm believes that it can possibly prevail in the instant case without offending the dictates indicated in Salas is incomprehensible.

Salas also brings the other interesting thought to mind that while a family-household exclusion cannot be directly placed into the uninsured motorist coverage to limit it, nevertheless the insurance carrier in the instant case believes that a family household exclusion can be introduced in a left handed or back door fashion indirectly. Why it is that the insurance company so adamantly believes that it can accomplish indirectly what it cannot accomplish directly is again difficult to understand. This does, however, explain why Porr had difficulty explaining her point on Cross Appeal and perhaps why the insurance carrier seeks to obviously obfuscate this issue. The point is that State Farm in the instant case has tried to limit the statutorily mandated UM coverage. Although Salas would state that the insurance carrier cannot do so directly by a family-household exclusion, the insurance carrier suggests that they may do so by a different type of exclusion as indicated in Reid and thus accomplish indirectly what they cannot accomplish directly. In order to discuss the Reid decision and show that (a) the instant case was different from Reid for multiple reasons including the fact that

the negligent driver was unrelated to either the owner or minor child killed in the accident and (b) to show that the underpinning of Reid itself is being criticised by the Courts for reasons as indicated in Cross Appellate's Main Brief, Cross Appellant Porr had to go directly to the "family household exclusion" clause which was the only reason that the Reid exception was permitted in the first instance. As the instant insurance carrier, State Farm, did not choose to discuss this further, Porr would merely refer the reader back to the main brief.

The purpose of the Florida legislature in enacting Florida's Uninsured Motorist Statute was and is to require coverage as if the offending motorist had maintained a policy of liability insurance. In the instant case, the innocent minor child was killed by the negligent acts of a driver who was not related in any way to the child nor its vehicle owner. There exists, in this case, absolutely zero reasons under Reid or any other rationale to avoid fulfilling the legislative mandate of requiring the purchased uninsured motorist coverage to provide benefits as if the offending negligent driver had maintained a policy of liability insurance to respond for the damages he caused. The offending motorist did not have insurance to respond in damages in the instant case and therefore Sheran Porr's uninsured motorist coverage purchased by her on each of three different vehicles should provide recovery. To hold otherwise would be violation of twenty years of court decisions stating this purpose of Florida's Uninsured Motorist Act.